IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

INDECK KEYSTONE ENERGY, LLC, Plaintiff	)	
v.	)	CIVIL ACTION NO. 04-325 ERIE
VICTORY ENERGY OPERATIONS, LLC, Defendant	)	

JURY TRIAL - DAY NO. 1

Proceedings held before the HONORABLE

SEAN J. McLAUGHLIN, U.S. District Judge,

in Courtroom C, U.S. Courthouse, Erie,

Pennsylvania, on Tuesday, May 8, 2007.

APPEARANCES:

JOHN K. GISLESON, Esquire, appearing on behalf of the Plaintiff.

ROBERT J. WILLIAMS, Esquire, appearing on behalf of the Plaintiff.

JENNIFER A. CALLERY, Esquire, appearing on behalf of the Plaintiff.

CHRISTOPHER T. SHEEAN, Esquire, appearing on behalf of the Defendant.

BRIAN W. LEWIS, Esquire, appearing on behalf of the Defendant.

MATTHEW M. GARRET, Esquire, appearing on behalf of the Defendant.

Ronald J. Bench, RMR - Official Court Reporter

I N D E X

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WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
FOR THE PLAINTIFF:				
Martin Swabb	84	--	--	--

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P R O C E E D I N G S

(Whereupon, the proceedings began at 11:38 a.m., on Tuesday, May 8, 2007, in Courtroom C.)

THE COURT: Swear the jury, please.

DEPUTY CLERK: Please stand and raise your right hand.

(Whereupon, the Jury Panel was sworn.)

THE COURT: Members of the jury, now that you have been sworn, you're going to be given some preliminary instructions to guide you in your participation in this case. It will be your duty to find from the evidence what the facts are. And you and you alone are the judges of the facts. You will then have to apply those facts to the law as I give it to you. And you must follow those instructions, whether you agree with them or not. Nothing that I may say or do during the course of this trial is intended to indicate or should be taken by you as indicating what your verdict should be.

The evidence from which you will find the facts will consist of the testimony of witnesses, documents and other things received into the record as exhibits. And any facts that the lawyers agree to or stipulate to or that the court may instruct you to find.

Now, certain things are not evidence and must not be

considered by you, I will list them for you now. Statements, arguments and questions by lawyers are not evidence. Objections to the questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe that evidence is being offered for an improper purpose under the rules of evidence. You should not be influenced by the objection or by my ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like you would any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction. Testimony that I have excluded or told you to disregard is not evidence and must not be considered by you. Anything that you may have seen or heard outside the courtroom is not evidence and also must be disregarded. You are to decide this case solely on the evidence that has been presented here in this courtroom.

Now, there are two types of evidence, direct and circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I am going to give you further instructions on these, as well as other matters, at the conclusion of the case. But for present purposes simply bear in mind that both types of evidence exist and you may consider both types of evidence. It will be up to you to decide which

witnesses to believe, which witnesses not to believe and how much of any witness's testimony to accept or reject. I will also be giving you further instructions at the conclusion of the case concerning the credibility of witnesses.

Now, this a civil case. And that means that the plaintiff has the burden of proving its case by what is called the preponderance of the evidence. And I should also tell you that it also means that the defendant has the burden of proving its counterclaim by what is known as the preponderance of the evidence. That means that the plaintiff and the defendant/counter-plaintiff has to produce evidence which considered in light of all the facts leads you to believe that what the plaintiff or the counter-plaintiff on the counterclaims is more likely true than not. To put it differently, if you were to put the plaintiff's and the defendant's evidence on opposite sides of the scale, the plaintiff would have to make the scales tip so that it's on its side. If the plaintiff fails to meet their burden, the verdict must be for the defendant.

Those of you who may have sat on a criminal case will have heard the term proof beyond a reasonable doubt. That requirement does not apply to a civil case and so you should put it out of your mind.

A few words about your conduct as jurors. First, I instruct you that during the trial, as I think I mentioned to

you earlier this morning, you are not to discuss the case with anyone or permit anyone to discuss the case with you. Until you retire to the jury room at end of this case to deliberate on your verdict, don't talk about it at all.

Do not read or listen to anything touching upon the case in any way. If anyone should try to talk to you about it, let us know. Do not try to do any research or make any independent investigation about this case on your own.

And, finally and importantly, do not form any opinion until all the evidence is in. That is to say, it's important that you keep an open mind until you start your deliberations at the end of this case.

Now, this question comes up frequently, so I'm going to address it right now. If you wish to take notes in this case, you may. And my deputy clerk will supply you with note pads and pencils, etc. The only instruction I would have in that regard is at the conclusion of each day of trial, you should leave your notes in the jury room.

The trial is going to begin immediately after lunchtime because I do not want to run into the lunch hour with the opening statements. Speaking of opening statements, an opening statement is neither evidence nor argument. It is an outline of what that party intends to prove, which is offered to help you follow the evidence. After the opening statements, the plaintiff will present its witnesses and the defendant may

cross-examine them. Then the defendant will present its witnesses and the plaintiff may cross-examine them. After that the attorneys will make what is known as their closing arguments to summarize and to interpret the evidence for you. And then after that I will give you the instructions on the law. And at that point you will retire to deliberate on your verdict.

All right, it is now a quarter to 12, I'm going to ask that you be back here and ready to go for opening statements at 1 o'clock.

(Luncheon recess from 11:45 a.m.; until 1:10 p.m.)

THE COURT: Are we ready to go?

MR. GISLESON: Yes, your Honor, we are.

THE COURT: Let's go.

MR. GISLESON: Good afternoon. My name is John Gisleson, I'm one of the attorneys who represents the plaintiff, Indeck Keystone Energy, in this lawsuit. As you heard, there are some other attorneys who are also working on this case. One is Jennifer Callery at the table. Another is Bob Williams. Then also sitting at counsel table is Chris Petcos. Chris, please stand up and say hello.

MR. PETCOS: Good afternoon.

MR. GISLESON: Chris is the general manager of Indeck Keystone Energy, which is the plaintiff in this lawsuit. And you're going to hear from Chris at some point during the

trial.

This trial is about the rules of competition in business. And the evidence in this case will show that the defendant, Victory Energy Operations, broke the rules and engaged in unfair competition. We know from our everyday lives what unfair competition is. It's an athlete who takes steroids to enhance his performance beyond what he could have done on his own.

Unfair competition is someone getting confidential information from a corporation, and then using that money or that information to make money, to make a profit. Unfair competition is plagiarizing. It's copying. Getting the benefit of something that someone else did and then claiming it as your own.

There are rules of competition in business. One rule is simple. If you have a contract, you got to keep your contract and comply with its terms, because that sets forth the rules of the relationship between one party and the other.

Another rule. You don't take someone else's technology. And if you're given a right to use the technology, then when you use it, you've got to stick within that scope of use and you can't go beyond it.

Another rule. A lot of companies have trademarks. Think of Coca-Cola, which is one of the premiere trademarks. Well, there's a trademark in this case. And that trademark is

Keystone. Keystone is the name of the boiler, and to Indeck Keystone, to Chris Petcos and the other employees of the company. Keystone is the company's Coca-Cola, it's an important trademark.

Now, in this case there was a contract between the parties. That contract was a License Agreement. And if you think about a fishing license, you know it's a right to use or a right to do something, or a hunting license. Well, the License Agreement is really the right to use technology. And it's a written contract. And what it does, it says this is the technology you could use, this is how you can use it, and this is the time period that you can use the technology.

What you're going to hear is that the defendant received technology under a License Agreement. That technology was for a boiler known as the Keystone standard M-Series boiler. The standard M-Series and the Keystone as a whole, traces its roots right back here to Erie. In fact, the corporate history, which predates Erie Indeck Keystone Energy, dates back to the mid 1800s, when some guys started a company, and it grew over time.

The License Agreement here describes the specific boiler that Victory Energy Operations, VEO, was permitted to sell. That License Agreement also told them how they could use the Keystone trademark, the company's Coca-Cola.

The License Agreement also provides, and you'll see

a copy of it at different points during the trial, that VEO was to use this license technology only for the standard M-Series. And that once the License Agreement expired, and it was a three-year license, the defendant had to give all the technology back. You couldn't keep it for yourself because it was a license, which is a right to use, it wasn't a sale, and it wasn't being given away.

In this case the plaintiff, Indeck Keystone Energy, will prove that the defendant broke the rules of competition in two ways.

First way. The defendant sold the Keystone boiler that was beyond the scope of the License Agreement. As I said, the License Agreement was for the standard M-Series boiler. Standard means standard designs, it's got a specific configuration. They were selling a broader, more customed boiler under the License Agreement. A boiler that was beyond the scope of what they could sell. And then they used the Keystone trademark in selling that boiler that was outside the scope of the contract.

Way number two that they broke the rules of competition. They copied. What you're going to hear is that the defendant began to develop its own boiler during the term of the License Agreement. And that its own boiler in a number of respects, not entirely, but in a number of respects copies particular designs from the Keystone boiler that the defendant

received in confidence during the term of the License Agreement.

Why did they develop their own boiler, why did they copy the design. Because they met with success. Because they made money, and they wanted to make more.

But why else. It's because the Keystone, as you're going to hear, is a proven design. Dates back to the 1950s, and they kept improving it over time, refining it based on actual experience.

What you're going to hear is that a proven design for a boiler is important. Why. Well, it's like buying a car. You don't want to buy the first model year of a car because they're still working out the kinks. Customers want to make sure the product is going to last. And they're going to make sure it can be maintained and efficient to operate.

This part of the trial simply focuses on whether VEO broke the rules. You don't have to worry about damages at this point. So there are really two questions, as I said. Number one, did they sell the boiler beyond the scope of the License Agreement. And, number two, did they copy the designs.

As the jurors, as you heard from the judge, you're the judges of the facts. And in this case, because it involves competition, you're the referees of the rules. You're the ones who decide whether based on this evidence the defendant broke the rules and engaged in unfair competition.

Now, as you can tell from the screen, from the number of computers, the boxes, the binders, there's some technology and there's some documents. But we have juries because we trust you. Because we know that jurors, when they apply their common sense to the evidence, they can divine right from wrong, fair from unfair. If you apply your common sense to the evidence in this case, even though it's somewhat technical, it will take you in the right direction.

To give you an example of that. When you're listening to the testimony of a witness on the stand, compare what the witnesses say here, now that there's a jury, to what they say back at the time before there was a judge, before there was a jury, when it was just one party and the other party head to head.

Some background. What is a Keystone boiler. Well, let me show you a picture of it, to give you some idea of the scale. A Keystone boiler is a very large machine that generates steam. That steam can be used in different applications. Such as to heat a building. Or to power a turbine engine.

When you look in the left-hand corner up here, you can see, thank you, D.J., -- incidentally, that's D.J. Miller, you'll hear me from time to time talk about D.J., he's the guy that controls the technology, make sure we move forward.

When you look at this, this gives you an idea as to

size. But also as to shape and the number of tubes. The Keystone is what's known as an O-type boiler. It's called an O-type because of the shape of the tubes in here, and the fact that they're concentric circles going out. What there is, is a lower drum at the bottom, and that lower drum contains the water. It's sometimes called a mud drum. The water then moves from the lower drum through all these different tubes.

What you're going to hear is there are more than 1,500 tubes. That makes its way through the tubes and eventually gets up to the upper drum, which is also known as the steam drum, where the steam separates. And then you take the steam, you're able to put it in your application.

Each of these different rows of tubes has a different function. Plus there's also a front wall and a back wall. The bottom line, you can't have a boiler without walls. It's likes having a house without walls. You can have a H back system, you're not going to be able to keep heated or cooled because there's nothing to contain it. And you're not going to have any structural support, either. Even when you have tubes, there's still a lot more that goes into a boiler. In fact, as you can tell from the size, it's really a complex jigsaw puzzle in a lot of ways, trying to put all the pieces and parts together.

Now, the boiler is also known as a package boiler. Now, what that means is it's shop assembled. You can build it

an integral unit in a plant and then ship it in one piece, so that reduces any work that has to be done at the job site. And so what this shows is the boiler in different phases of construction.

Up here you see it with the walls coming on and some of the structural supports. More about the walls there. And here it's being loaded on to a rail car, which is one of the ways it gets shipped.

You're going to hear that it's a very competitive market, and there are a number of different manufacturers, as you can imagine. Boilers have been around for more than a hundred years. And even though some of the general concepts are known, what you're going to find out is when you get down to the details, when you're trying to match up boiler to boiler, what you find out is that there's some differences.

And truth be known, truth be told, the manufacturers don't want to give out their detailed design information because whatever advantage you can get, you want to keep to yourself. You don't want to share it.

You heard the judge mention public domain. And you're going to hear evidence about whether the Keystone designs are in the public domain. Whether they're generally available. But when you hear that evidence, focus on whether the specific designs for this boiler ever entered the public domain, whether they became generally available. And then

consider whether the defendant copied something from the public domain or they copied something from Indeck Keystone.

Now, just to give you some history of the company. As I said, it's got an old history, it started in 1840. Bethel Boyd Vincent and a group of partners founded Presque Isle Foundry in Erie. The name changed in 1851 to Erie City Iron Works. Which shows you the close connection which Keystone has to Erie.

In 1966 it's purchased by a company called Zurn Industries, renamed it Zurn Energy. You may see the Zurn name from time to time in this lawsuit.

In 1997 the company was purchased by Aalborg Industries, which is a Danish company. They renamed it Aalborg. It was sold again in 2002. And then again in 2004.

It was in 2004 that the plaintiff, Indeck Keystone Energy, acquired the technology. And they did so from a company named Erie Power Technologies, Inc. What that shows you is the importance of technology. Because, unfortunately, as we all know, manufacturing in Erie, in the country, has taken a hit. But the one thing that can endure, the one thing that can keep people employed is the technology. Because it's got value. The value is in technology and in people. And that's why companies like Indeck Keystone Energy seek to protect their technology.

I'll just quickly show you the cutout of the inside

of a boiler. That's just another view that shows you the lower drum and the upper drum. But what it also shows is that from the outside it's all encased, so you can't see what's going on on the interior of the boiler. As I said, there's more than 1,500 tubes, more than a thousand different parts. And these boilers are sufficiently complex that they cost hundred of thousands of dollars each, and sometimes more than a million dollars each.

And you're going to hear from some engineers about how the design was developed and more specifically about how it works. And they're going to tell you that it's a proven design, proven by the fact that more than 2,000 Keystone boilers have been sold over its history. Many are still in existence, still working, 20, 30, 40, 50 years later, which is a testament to the quality of design and the fact it's excellent to maintain and to operate over time.

Proven design and safety, as I said, are important. These things can explode if they're not properly designed. There are also various safety codes that they must comply with. And then, as I say, customers expect a design to work from an operational perspective, as well as a maintenance perspective and to last. All those considerations, operation, safety, performance, all that is built into the designs, and those designs ultimately are continued in drawings.

And there's going to be a lot of testimony in the

case, at least some testimony, about drawings. And there are different kinds of drawings. Not all drawings are created equal. There are some general drawings that are used for marketing purposes. Basically, to give people a general idea about what the different features or components of a boiler is.

But then you have the more detailed designs, including assembly drawings. And if you think about it, a detailed design is kind of like the recipe. The recipe for how to put the boiler together. Because what it does is it tells you the ingredients, all the different pieces and parts. Then it tells you how many of each, it tells you what order to put them in. And then it gives you the sequence of how you assemble it once you figured out what the pieces and parts are. Although it may sound easy at first, when you're working with more than 1,500 tubes, when you're working with all these parts, and when each part of the boiler has a specific function, it gets complicated.

And even though there are going to be similarities among boilers, there's also going to be differences. And it's those differences that give you the competitive advantage. And it's because of those differences that you don't want to share the recipe. You certainly don't want somebody to steal the recipe.

When you look at the designs, the drawings, one of the things you're going to see is a stamp on the drawings, that

is going to be true for Indeck's drawings, it's going to be true for Victory's drawings. Everybody always stamps the drawings confidential or proprietary or not to be used by a third party. Why is that. It's because they're important. It is because this is the road map, the recipe that tells you how it is designed and built.

And under the law, you have to take reasonable measures to protect it. It doesn't have to be Fort Knox. But it has to be reasonable. So one of the questions for you to decide is were the measures taken over time to protect the technology reasonable. And that includes such things as confidentiality agreements, and limited distribution of the drawings. And what you'll see is that there were reasonable measures that were taken here.

So how does Indeck Keystone Energy fit into this. As I said, it bought the technology in 2004 from Erie Power Technologies. At the time it only had 11 employees. Since then it has grown to 28 employees, all local. What you're going to hear is that all 28 employees have a connection to the history that I showed you on the board. To one of the successor companies, and they've worked with the Keystone.

Just like the Keystone has been the lifeblood of all those different companies so, too, was the Keystone providing jobs for the Indeck employees.

MR. SHEEAN: Your Honor, I'm going to object, this

is argument in terms of provision of jobs.

THE COURT: Overruled. Go ahead.

MR. GISLESON: Where does VEO fit into this, the defendant. They entered into a License Agreement with Erie Power Technologies. That was the company from whom Indeck Keystone acquired the technology.

Erie Power Technologies then had some employees, some engineers who went over and began to work for Indeck Keystone. That License Agreement was entered in January of 2003. And it was for the standard M-Series boiler.

You're going to hear a lot about standard M-Series. That is an older technology, that really is the baseline technology for the overall Keystone boiler. And kind of the hallmark, if you will, you'll hear this a lot during the trial, of the standard M-Series or tangent tubes, which simply means the tubes touch inside the boiler.

There was also more current technology, which is called membrane wall technology. Instead of the tubes touching, there was a bar between the tubes. So it's slightly different, but it's an important difference, because the membrane is newer, the tangent tube is an older technology.

The License Agreement specifically showed only the older technology and had no mention of the newer technology. And that's where the dispute lies under the License Agreement. And that is was the defendant limited to selling boilers that

only had tangent tube technology or could they sell boilers that had more modern or custom features, such as membrane wall technology.

So how did this License Agreement start. What you're going to hear is that the president of the defendant, a man named John Viskup, sitting in the front row against the wall, contacted Erie Power. And he told Erie Power that he wanted to license the M-Series. So he specifically referenced the M-Series. He already knew of the Keystone, he knew of the M-Series. And at that time the defendant didn't have any of his own technology for an O-type watertube boiler. This was the very first time he was obtaining that technology.

He negotiated the License Agreement with a man named Mark White. Mark White at the time worked for Erie Power Technologies. And he was their sales and marketing director. As sales and marketing director, Mark White also knew what the technology was, and he had access to all the drawings pertaining to that technology.

What Mark White did was he went to the president of the company, because the president of the company had to know about the License Agreement. And what Mark White told the president of the company was that the technology to be licensed was outdated and antiquated. And you're going to hear videotaped testimony from the president, who will tell you what Mark White told him. Because, as I said, the standard M-Series

is older technology.

The president, though, told Mark White to work with the engineering department. Because like many of us, the president of the company wasn't particularly technical. He was relatively new to the company. But he wanted to make sure that this License Agreement clearly defined what the technology was. And Mark White said yes, I will work with the engineering department to define the technology.

And what you're going to hear is from Erie Power engineers, who worked with Mark White, they'll tell you about their communications with Mr. White, many of which were in writing. And what they will tell you is that the licensed product was the standard M-Series.

Let's take a look at the first page of the written contract. This is the cover letter transmitting it from Mark White at Erie Power to John Viskup. Next page, please. And again.

This is a cover page of the License Agreement from January of 2003. Would you please call out products. Now, what this says is "the products shall mean natural circulation, industrial watertube package steam generators with a steam capacity range beginning at 29,000 pph," which is pounds per hour," up to and including 150,000 pounds per hour. Products shall include but not be limited to the items set forth in Annex I."

And that sentence is one of the key phrases for you as the referees of the rules to decide what its intent was between these parties.

It's plaintiff's position that it's Annex I that defines the License Agreement, that defines the licensed product.

The defendant, in contrast, believes that because the sentence says "includes but not be limited to," they could sell whatever they wanted, whenever they wanted. Which of course raises a question for you of what does Annex I say, what's does it mean.

What you're going to see that in the course of negotiations "includes but not limited to" was never a subject of negotiation. In fact, the defendant cared about the financial terms, not the technical terms of the agreement. And they knew when they signed the License Agreement, that they still had to agree to Annex I.

What happens was Mark White, the sales and marketing director for Erie Power, sent a draft of Annex I to the engineering department. If you can call this out, please.

This is one of the most important documents in the case. And the reason it is, because it's how Mark White describes Annex I. And what he says is "please review the enclosed Annex I, which is the product description of the License Agreement and provide your comments. I'd like to

finalize this week if possible." This is an example of what I mean when I say as you listen to the testimony, compare what they say now to what they wrote then. And he's sending this to Bob Gdaniec, who is the chief engineer at Erie Power responsible for the technology. Also to Dave Briggs and Ted Fuhrman, both of whom also were with the engineering department.

Then he promptly hears back from the engineers because they cared about this. What do they tell him. If you call out, please, that portion.

Dave Briggs, in the engineering department, writes back to Mr. White and says "I have looked at the Annex as well and the following are my comments as to what should be added." What does he identify. Tangent furnace wall tubes. Tangent outer wall tubes. Units were saturated. And that the front and wall construction is that of refractory. No front wall tubes at all.

As I said, the tangent tubes are the defining characteristic of the standard M-Series. Then go back, please. What does he write. "Thanks." No dispute, nothing.

Now, you can make modifications to a tangent tube boiler to give it the performance characteristics of membrane, it's called seal welding the tangent tubes. Where you keep them together, but there's a weld you can do that's going to give you the gas sealing that you might want in a boiler. So

that was an option.

But what you're going to hear is that the defendant never took advantage of that manufacturing opportunity. So what was the final Annex I. What you're going to see is that Mark White, on behalf of Erie Power, then sends back the final Annex I to John Viskup. Next page, please. And what they did is they initialed each and every page of the License Agreement. And why did they do that. Because it shows that they had read it and that they agreed to its terms.

If you please call out that portion, including that line, thanks. What you're going to see is there's a reference to the description of products. Again, it refers to the M-Series Keystone. And then below design it says "for the purpose of this agreement, the thermal performance of the above M-Series Keystone boilers products are based on the following design parameters." And then, again, at the bottom there's a reference to standard M-Series Keystone summary.

Standard means that they're standard designs. You'll hear under the evidence that Erie Power in fact provided standard designs to Victory Energy.

You'll also see that there was a data table that was included in Annex I. And the data table included specific information about the boilers. Such as height, width and length. Temperatures and operating pressure. Basically, characteristics in geometry that again define the boiler.

But so that there was no dispute about what the licensed product was, Erie Power included a drawing so that everyone would know what the product was.

Call that out please, including the title. Thank you. As you can see, this starts out with Keystone M-Series standard at the top. But then in addition to having the drawing, there is a simple test. Would you call that up, please.

It's not as clear as I would like it, but it says "front wall refractory, rear wall tube and tile water cooled, outer walls tangent tube, furnace walls tangent tube." Go back, please. Call up the whole thing. And then even when you look along the side, there is a reference here again to furnace wall tangent tube. Back, please. And then also for outer wall tangent tube, right there. And then it also shows that there's a refractory, which is insulating material in the front of the boiler.

So all of that is kind of complex and specific, what it tells you is care went into the creation of Annex I. And what Mark White did was include all those defining characteristics that were identified to him by the engineering department.

Why am I bringing this up. Because the defendant says that the License Agreement doesn't mean what it says. According to the defendant, it wasn't limited to the standard

M-Series, that they could go beyond that.

Our position, the License Agreement means what it says. The defendant's position, it doesn't mean what it says. That's an issue for you as the referees of the rules to decide.

What happened was that VEO then begins to market these boilers and it makes a sale. But it's very first sale wasn't a tangent tube boiler. It was the more custom designed, a membrane wall boiler. It goes back to Erie Power and say hey, we got this sale, do you want to do it. And Erie Power agrees to help Victory with this custom boiler. That's not a standard M-Series because it has the membrane walls. And Erie provided them with drawings to show them how to do the custom design of the membrane walls.

Why, because Erie Power was in financial distress. It was a sale to help the licensee get started. But Erie Power was in financial trouble. Financial trouble that continued, as you'll hear, throughout the course of its relationship with Victory Energy.

Providing those designs is important because that explains how they got the designs in the first place and how they're able to access those designs when it came time for them to design their own boiler, the Voyager boiler.

But what you'll hear is that even though Erie Power provided those detailed designs for the membrane walls and other custom features, they never amended the License

Agreement. What that meant is they could use the designs on a case-by-case basis if Erie Power gave them permission. But because there wasn't a written amendment to the contract, they couldn't sell it whenever they wanted. Erie Power had the right to say no.

So what happens. Erie Power gave Victory Energy an inch. Victory Energy took a mile. What you're going to see under the evidence is that Victory Energy didn't market standard M-Series boilers. As it turns out, they were only marketing custom boilers, custom designed boilers.

But what you're also going to hear is that consistently Erie Power was telling Victory Energy, you know, the scope of the agreement is the standard M-Series, what you're doing is not a standard M-Series. The engineers were concerned.

And the evidence is going to show that the chief engineer for VEO said my biggest frustration is being told this boiler is not a standard M-Series. Which shows you that Erie Power cared about the technology, and they were doing their best to try and reign in VEO.

Here's another common sense point during the trial. You're going to see a number of instances in which Erie Power and Indeck said to VEO hey, this is outside the scope or you're limited to a standard M-Series boiler. See if there are any occasions, even once, when Victory Energy writes back to Erie

Power or to Indeck and says no, we can sell whatever we want. We can sell a custom boiler. See if that ever happens during the course of the trial.

You're also going to hear that VEO never even gave a copy of the License Agreement to its chief engineer or to its salespeople so that they could determine for themselves what the scope of the License Agreement was. They didn't know.

But, unfortunately, even though Erie Power permitted VEO to go beyond the scope of the License Agreement, Erie Power's problems didn't get any better. In fact, they ended up going into bankruptcy. And there were layoffs that were occurring with the company.

One of those people who was laid off was Mark White. That's Mark White sitting over there next to John Viskup. It was Mark White who entered into the License Agreement with Erie Power. It was Mark White who permitted VEO to go beyond the scope of the License Agreement to sell these custom boilers. Three days after he lost his job with Erie Power, he called VEO. He got a job and now he's their general manager. And he goes from working for the licensor to working for the licensee.

And you're going to hear him in this trial testify about what he believes the scope of the License Agreement is. He's going to tell you that VEO could sell whatever they wanted whenever they wanted. But compare what he says on the stand to what's in the documents, what was written at the time.

The engineers, though, were becoming increasingly concerned, including after Mark White left. Because they knew the technology was how they were going to get out of this bankruptcy.

It all came to a head in March of 2004. One of the engineers, a man named Bob Gdaniec, sent a letter to Mark White, who is now with VEO, that talked about the scope of the License Agreement. And then tried to get VEO to pull back to the scope of the standard M-Series.

This is another really important piece of evidence in the case. Because what he says in the second paragraph -- could you highlight the sentence beginning with while, "while things in general have gone well over the past year, we do have concerns with regard to the past years performance that needs to be addressed and resolved. Attached is an overview of our concerns for your reference." Then he goes beyond that and sends a detailed analysis included with this letter.

First paragraph, please, number one. What he says is "VEO currently licenses only the M-Series product line. Which has a very specific geometry and characteristics." And that refers to Annex I that we looked at. "In review of some of VEO recent projects and proposals, it appears that the majority of projects that VEO is pursuing or has completed has been outside the definition of the License Agreement. Of particular concern most recently are the Oxy and Dallas/Fort

Worth Airport projects, which are well outside the bounds of the products defined in the agreement. VEO will need to redirect their attention on the sales and marketing and execution of the products that are defined in the License Agreement."

What does that mean. It means stop. We let you do it before, but now we're not going to let you do it anymore.

But he goes on to say "Annex I of the current agreement provides a clear definition of the M-Series design with product size, dimensional data for the different size ranges, typical cross-section of the boiler and overall boiler construction, which includes refractory front and rear walls, tangent furnace and outer wall tubes and pressure casing design." And there's the reference again to the tangent wall tubes.

At this point it's teed up. The License Agreement has been in effect for a little over a year. You have Bob Gdaniec, chief engineer at Erie Power, sending a letter to VEO expressing concerns about his performance. You would expect a response from VEO. And what you'll see is that VEO in fact sent a response. And in that response they specifically addressed, the first two paragraphs, please -- they specifically address the assertion that they were selling boilers outside the scope of the License Agreement.

And what this letter says, it was written by Mark

White, after sending drafts to John Viskup, the two people who were involved directly with the discussions in the License Agreement, it says "the agreement does provide specific geometry and characteristics, but also allows for improvements, refer to clause 13. As such, VEO has made improvements which are necessary to the offer/provide a Keystone boiler that is technically compliant with customer's requirements in line with that of our competitor's offerings, and as we deem necessary to enhance our overall success." That first sentence refers to Annex I.

But going down here it says the Oxyvana's project includes (2) 515 M-Series Keystone boilers, each of which include membrane furnace and outer walls. Which is the more custom design I mentioned. Walter cooled front and rear, and an upper drum size of 60 inches interior diameter. D.J., could you highlight the next sentence, please.

"These features are outside the geometry and characteristics of the license but are clearly improvements." Geometry and characteristics of the license is Annex I. And there's a clause in the contract that talks about improvements. So what we see is correspondence directly addressing the scope of the License Agreement, and VEO is saying that the membrane walls and certain other changes, including a change to the drum side, are outside the geometry and characteristics of the License Agreement.

But why is that important. Because Victory Energy is now saying that letter doesn't mean what it says. You're going to hear them say that was a mistake. The membrane walls in fact are within the scope of the License Agreement. And you're going to hear that from Mark White and from John Viskup, who will be testifying on that stand. They're going to say, you know what, even though we called that improvements, they really weren't improvements, they were no improvements, it was always within the scope. That's another common sense point for you to evaluate as you listen to the evidence.

What you're going to hear is that VEO disregarded the letter and they continued selling custom boilers. They didn't stop, even though Erie Power asked them to do so. And they continued sending out sales proposals using the Keystone trademark for custom boilers.

The License Agreement was then transferred during the bankruptcy to Indeck Keystone Energy. When Indeck Keystone Energy purchased some of the assets from Erie Power. At that point some of the engineers from Erie Power, including Chris Petcos, went over to Indeck Keystone, one of the first things they did was to say stop. They sent a letter that defines what the scope of the License Agreement was, and you'll see the letter, and they used language that tracked what Mr. Gdaniec said in his letter to VEO. And they sent it to Mark White, who had been a colleague of theirs. Did Mark White send a response

to Mr. Petcos saying you're wrong about the scope of the agreement. Let's see if we see such a piece of paper in the case.

While Indeck Keystone was licensor, what you're going to see is that Victory Energy continued to send out sales proposals with the Keystone trademark for custom boilers. And they in fact continued to make boiler sales, while Indeck was the licensor, using the Keystone trademark for boilers that were custom. And even though Victory Energy was disclosing its sale of membrane wall boilers to Erie Power because they were working together on a case-by-case basis, they never made that disclosure to Indeck Keystone.

But those sales proposals are important for another reason. And you're going to see a number of the proposals in this case. They never refer to the fact that there was a License Agreement. In fact, what you're going to see is even though these are for a Keystone boiler, they started referring to the boiler as a VE boiler or Victory Energy boiler.

Then they started referring to these as being VEO designs, instead of Keystone designs. Then what you're going to see is that for some proposals they don't even use the Keystone design. They just call it a Victory Energy boiler or a Victory boiler.

When they got a copy of the Keystone brochure from Erie Power, what you're going to see is they simply copied it,

and they changed the names in there, I think it was the old Zurn brochure, from Zurn to VEO. And when it talks about who developed the designs, they just said VEO. And there was no limitation in there into what the scope of the License Agreement was, basically implied, as you'll see, that they could sell any Keystone boiler that they wanted to.

But you know what Erie Power did in the same Gdaniec letter we saw, Erie Power sent a letter to Mark White and said we would like to see the marketing materials, we believe we have the right to do so, to make sure you're marketing the boiler appropriately. What did Mark White say, who negotiated the License Agreement on behalf of Erie Power. You're going to hear him testify. And his statement was no, we're not going to show you the marketing materials, we believe they're proprietary. So that even though Erie Power was attempting to find out how these boilers were being marketed, VEO said no.

Second issue. Actually before I get to that. The judge mentioned that there were counterclaims in this case, and there are. The defendant, VEO, brought claims against Indeck Keystone. And the claims are based on statements that Indeck allegedly made to customers and sales reps of VEO. In which, according to VEO, the statements were untrue or were wrong.

It's our position, as you'll see from the evidence, that Indeck didn't say anything wrong, didn't say anything untruthful. What you're also going to see is even the

statements that are identified by VEO didn't harm VEO. Because they didn't get sales. For example, one of the things it is upset about is sales rep.

Indeck Keystone hired some sales who worked for VEO, who had also worked for Erie Power. Indeck Keystone said look, you can only use, you can either sell the Indeck Keystone products or Victory Energy products, but you can't sell both. Because we don't want sales reps to have divided loyalties. At that point the sales reps had a decision to make, they could work for Indeck Keystone or they could work for Victory Energy, it was up to them.

What you're going to hear from Victory Energy is they didn't want their sales reps working for a competitor, Indeck Keystone was a competitor. But they didn't like the fact that Indeck made them choose, even though VEO itself made them choose. But the bottom line is the statements are much ado about nothing.

Issue number two is the copying issue. And that is simply did VEO, based on the confidential design documents in its possession, copy any aspect of the Keystone design into its Voyager boiler. How did this arise.

In September of 2004 something bad, something really bad happened to VEO. Indeck Keystone bought the technology. Because Indeck Keystone, unlike Erie Power, was not in financial distress. As soon as Indeck Keystone became

licensor, it said stop, no more, standard M-Series only.

At that point VEO had a choice to make. We all make choices in life. We can choose to play by the rules or we can choose to break the rules. Playing by the rules here means they could have developed a boiler from scratch on its own. They could have bought the technology or licensed the technology from someone else. Or you can choose to break the rules. You can cheat or you can copy. It's like using confidential inside information to make a profit or taking steroids.

In fact, the evidence in this case will show that the defendant wanted to buy the Keystone technology. That six months before the technology was sold, VEO spoke with the president of Erie Power and wanted to buy the technology. Erie Power said we'll sell you the standard M-Series, that's the subject of the License Agreement, but we're not going to sell custom design, the membrane wall designs.

You're going to hear that Victory Energy took the position we don't want to buy just the standard M-Series, we want the custom designs. The discussions got into a half million or more dollars, but it didn't go anywhere. Because Erie Power wouldn't budge to sell at that price, and Victory Energy didn't want to buy just the standard M-Series.

You'll also hear that they had discussions about expanding the License Agreement to include the membrane walls.

Which means had VEO amended the License Agreement and paid more money to Erie Power, they could have been selling membrane wall boilers with consent, with permission. But VEO didn't go for the License Agreement, instead they went radio silent.

So what does VEO do. Fall of 2004, after Indeck Keystone becomes licensor, they begin to develop their own boiler. During the time of the License Agreement, they never told Indeck Keystone. Did VEO choose to play by the rules.

Well, you're going to find out that the person from Victory Energy responsible for the design was Mark White. The same Mark White who negotiated the License Agreement on behalf of Erie Power. Mark White is not an engineer. He never designed a boiler from scratch. But he worked on Keystone boilers under the License Agreement. He had a paper copy of all the design drawings. He had all the design drawings on the computer network to which he had access. And he had a copy of the Keystone design guide.

Who worked with Mr. White. Trent Miller, the chief engineer for Victory Energy. Mr. Miller had never drafted a boiler from scratch. But he did work on Keystone projects. He had his own set of the drawings. He had access to the drawings on the computer network. And he had his own copy of the Keystone design guide, that was given under the License Agreement.

Who did they work with. A draftsman name Carl

Logan, who was responsible for creating the specific designs on the paper, based on information he received from Mr. Miller, as well as Mr. White. He had prepared drawings for Keystone boilers. He had access to all the drawings. He had access to the computer network that stored the drawings.

What you're going to hear is that Mark White tried to do it from scratch. In fact, he worked on the tube layouts, which is a configuration of tubes drum to drum, from the fall of 2004, until January, 2006. And he had a choice to make. There's an O-type boiler, an A-type boiler, and a D-type boiler, that basically refers to the configuration of the tubes and the drums. Choice of three, he chose the O-type. Choice of fuels, you'll hear he chose the same fuels as with the Keystone.

But he used a trial and error to try and develop the tube layout. But then something happened. Using trial and error, it took from the fall of 2004 until January of 2006 to get the tube layout to 90 percent. The rest of the boiler design was 10 percent. And he had a problem at that point. Because the License Agreement was over, and if they went out of the market to try and develop the design, they could potentially lose sales, lose visibility in the market.

So what you're going to hear, though, is that VEO knows it would be unfair to copy drawings because their own witnesses will tell you how important their drawings are to

them and how they don't want anyone to copy their drawings.

But on January 7, 2006, the License Agreement expired. And VEO no longer had the right to sell Keystone boilers under the license. And it only had a boiler design, which was 90 percent complete as the tube layout. And it needed walls. A boiler won't work without walls.

We will present evidence that Victory Energy copied important design features of the Keystone into the Voyager boiler.

What you're going to hear is that Victory started marketing its boiler on January 11th, four days after the License Agreement expired, when the tube layout was only 90 percent complete, and the rest of the boiler was only 10 percent complete. And it made its first sale only a couple days thereafter.

The first proposal it officially sent out was on January 11th, to a company called Abengoa. What you can see is it's got the proposal date, January 11th, and the proposal number, which is VE-1925, it's for a 150,000 pounds per hour watertube steam boiler, which is pretty big.

And go into the letter, please. Next two pages. What this shows is it was sent out by John Viskup, the president of VEO. But this wasn't the first proposal that VEO sent to Abengoa.

What you're going to see is that on December 5,

2005, only a few weeks before, there was a proposal that went out for two 150,000 pounds per hour watertube steam boilers. Next two pages, please.

It's the same proposal number, that VE-1925, that we saw in the Abengoa proposal for the Voyager. It's also sent out by John Viskup, the president of VEO.

Do a side-by-side, please. When you match up the proposal that Mr. Viskup sent to Abengoa in December for a Keystone, with the one he sent January 11th to Abengoa for a Voyager, what we find is they match up completely.

What happened. The evidence will show that he simply substituted a new proposal to Abengoa after the License Agreement expired, but all the text is the same.

As you can see, the proposal number 1925 is the same. You may continue through, please. And that it lines up the same way. Keep going, please. When you look at the general information about the boiler -- keep going please, thank you.

When you match this up, it's the same description of the boiler -- verbatim. Next paragraph, please. And now they're talking about the furnace walls tubes of any boiler. What you see is the first wall tube design was also copied as a specific design construction feature.

If you could go on to the wall description, please. Call that out, please. The way that they define and describe

the wall construction is identical in the proposal they sent out for the Keystone, as well as for the proposal they sent out for the Voyager. Why is that. Because we believe that under the evidence, you will see they copied the wall designs. And you're going to see the importance of the wall designs, because Victory Energy in its proposals consistently identified the wall construction as an important feature of the boilers. And you'll see that for every Voyager proposal they sent out, they included the same description of the walls. So that this important construction feature that we believe was copied, was an important part of every sale they made.

How many sales. They made 43 sales into the millions of dollars of these boilers in just 16 months when their design was only 90 percent complete as to tubes in January, and 10 percent complete as to the rest of the boiler. Is that fair competition. That's for you to decide as the referees of the rules.

You're going to hear from the engineers, they'll tell you about the designs. Two of those engineers are Marty Swabb and Bob Seibel. They personally were involved with developing the designs, the designs that under this evidence were copied by the defendant.

Even though, and I'm coming to the end, even though there's some technical evidence, ultimately, your common sense will take you in the right direction. Because at the end of

the day, it's almost like Sesame Street, you're matching up two documents, two drawings, to see if they're alike, what's the same and what's not the same.

You're going to see some evidence that there are design differences between the Voyager and Keystone. That's true. But you shouldn't have identical designs in the two boilers unless it was copied. Because if you do it the old-fashion way through hard work, like Marty Swabb and Bob Seibel did, the design should be different. Because we're all different. You come with different designs with what we do in our day-to-day lives.

When VEO's lawyer gets up here, see if he denies that VEO copied. When VEO's witnesses take the stand, see if they deny copying. Then compare the testimony as stated to what you see.

This is an example of the front wall of the boiler. It's called welded front wall assembly. You can tell just from looking at the drawings that the layout is the same. Then what we do is you start to match up different components of the boiler drawings to see whether they match or whether they don't match. Stop here please, D.J.

One of the suggestions we have for you when you're looking at the drawings is to look at the text. Because although some of the detailed designs can be complicated, if VEO was truly designing the boiler from scratch using its own

drawings, its own creativity and hard work, you shouldn't have identical text on their drawing that also appears on the Keystone drawing that predated what they did. We suggest that you look at the text, as well as the overall layout of the drawings to see whether there was copying. Next please, D.J.

And then you start to match up other features on the drawing, and you start to see identical designs. Next, please. You see identical spacing, identical tube sizes, identical layouts. The spacing down here is the same, the tube layout is the same. Next, please.

Same with this. That design is substantially similar, if not identical, to each other. An example of a difference, they have a larger lower drum. Upper drum is the same. General construction design on the two boilers is the same. And you'll see that they copied other designs as well.

As referees to the rules, you decide if there was copying. And you're also detectives to spot what drawings have copying on them.

At the end of this case, we're going to ask you to find in favor of Indeck Keystone. Because VEO broke the rules. It sold boilers outside of the scope and it also copied the designs.

You'll hear about what the designs are trade secret or in the public domain. The issue is simply do these designs have a competitive advantage. And did the owner of the designs

take reasonable measures to protect the information in the drawings. We believe the evidence will support that. And that these specific drawings were not in the public domain, they were special, which is why VEO sought to buy them.

At the end of the day, because VEO copied the designs, it took what would have been an average boiler at best and put it on steroids using confidential information it gained under the License Agreement. Based on the evidence you will see in the next two weeks, but hopefully much shorter, we're going to ask you to return a verdict for Indeck Keystone on both sets of its claims. Thank you.

THE COURT: Members of the jury, I'm going to give you a short break before we hear the opening statement from the defense. I'm going to stay on the bench, I have some matters I want to take up with counsel, you're welcome to go back in the jury room.

(Jury dismissed from Courtroom C at 2:10 p.m.)

THE COURT: All right. Have you folks worked out a stipulation on this damage question that I talked about?

MR. GISLESON: No, not yet.

MR. LEWIS: Your Honor, we would like to renew our motion barring the evidence of lost profits.

THE COURT: Would you come up to the podium, please.

MR. LEWIS: Your Honor, we renew our motion with respect to barring evidence of lost profits. This jury has now

heard a $45 million lost profit figure. We were going to work out a stipulation and we prepared a stipulation to say that we made profits under the sale of the Keystone and Voyager boilers. It should not go beyond that. And it is very clear, based upon the arguments relating to the proposals, that they are again, that they're sneaking back into this case the reverse passing off claim. So we renew our motion with respect to proposals, also.

MR. GISLESON: I did not say that there was $45 million in profits that were made. I identified that there were more than 40 boilers that were sold. And I said that the sales were in the millions of dollars. Which is an accurate statement. I specifically did not, I wanted to say more than $50 million, but I refrained from doing that. I did not say anything about damages. I specifically told them that this part of the trial is not about damages. The other aspect on the proposals, we don't have a reverse passing off claim, the court ruled on that. I'm not arguing reverse passing off. It ties directly into the unfair competition claim. How they use these proposals to set themselves up for once the License Agreement expired.

THE COURT: What motion are you renewing now, is it the motion I took under advisement relative to the appropriate measure of damages?

MR. LEWIS: Yes, your Honor, part of that motion is

we wanted to make sure we were truly having a bifurcated trial on liability, where we weren't mentioning the issue of lost profits. And not letting them infer the amount of lost profits based on argument.

THE COURT: What relief are you requesting?

MR. LEWIS: Well, we prepared a stipulation.

THE COURT: Hang on a second, he can't get us both down. I didn't hear him mention profits. The record will speak for itself. I heard him mention sales. And assuming that's correct, are you objecting to a statement made in his opening statement or are you asking again for a ruling from me on the appropriate measure of damages?

MR. LEWIS: I believe I'm asking for an understanding of limiting in connection with the evidence. Are we going to hear evidence of $45 million in sales and let the jury infer that half of that is lost profits. I believe that the stipulation that we should have and I prepared it, I don't know whether Mr. Gisleson has had a chance to look at it. "Victory Energy Operations, LLC, earned profits on the sale of Keystone boilers during the time prior to the expiration of the License Agreement. And Victory Energy Operations, LLC, earned profits on the sale of Voyager boilers after the License Agreement expired."

THE COURT: All right, there you go. There's the proposed stipulation, is that acceptable?

MR. GISLESON: I need to discuss it with my client. I would like to identify the dollar value of the sales. Because that ties directly into how important and valuable the technology is.

THE COURT: What I'm talking about now is a stipulation, outside the presence of the jury, which they're never going to hear, at least in this liability phase. Because it's unnecessary. But I'm talking about a stipulation which may nevertheless be necessary for you prove up all the elements of your case. So what more do you want beyond what he just said?

MR. GISLESON: The dollar value of total sales under each the Keystone and the Voyager.

THE COURT: Would it be true that during the course of discovery, let me ask it this way. Is there any dispute, I mean there's a dispute here on just about everything, but is there any dispute about the gross dollar value of the sales that VEO generated?

MR. GISLESON: No.

MR. SHEEAN: When you say the gross dollar sales, judge, are you talking about the total income Victory Energy received on the sale of boilers?

THE COURT: I guess that's what I'm talking about?

MR. GISLESON: I would be happy just to total up the sale price of the boiler, setting aside any after-market parts

or anything else they sold. I just want the sales prices as identified in the purchase orders and proposals, I add those up and I say total sales for 11 Keystones were this, total sales for 43 Voyager boilers were that, that's all I care about.

MR. SHEEAN: Why does that need to be in a stipulation that's not going to be shown to the jury?

MR. GISLESON: I do want to get that into evidence to the jury can hear because -- it's not profits, because it says look, the court gave the jury an instruction on public domain. And the jury is going to hear, based on their argument, that everything that was copied was in the public domain. They tried to buy the technology. And they immediately began selling this Voyager boiler, that includes copied technology. The dollar value of the sales goes directly to unfair competition, unjust enrichment, because they didn't take time out of the market. They jumped into it feet first and they did it on the backs of the Keystone technology. The fact they were able to generate not just so many sales, but so many sales at a high dollar value, is definitely probative to unfairness, to unjust enrichment and to value of these wall designs.

MR. LEWIS: It is highly prejudicial, your Honor. What they're saying is we're a poor bankrupt company and look at these big bad guys who they pointed to all through opening statement, they made nearly $45 or $50 million in gross

revenues. That doesn't have any place in this liability phase. All they have to prove is that it had value, and they prove that by us reading the stipulation that they made profits on. The issue of the amount and the lost profits goes to the issue of damages, if we ever get to that.

THE COURT: I'm hard pressed to see how, in terms of the jury resolving the issues as to whether or not the information was a trade secret, whether or not the information was in the public domain, I'm hard pressed to see whether it would, in resolving those issues, it would make any difference to the jury whether you engaged in sales of $10,000 or $10 million. I just don't see it as relevant. Now, the bell did get rung a little bit in your opening statement. Because you already referenced, I think you referenced millions of dollars worth of sales. That can't conveniently be unrung, and I'm not going to try to unring it. And I don't think you want me to try to unring it?

MR. SHEEAN: I just don't want it to be mentioned again, judge.

THE COURT: So it won't be. So getting back to the stipulation that you proposed, read it to me one more time?

MR. LEWIS: "Victory Energy Operations, LLC, earned profits on the sale of Keystone boilers during the time prior to the expiration of the License Agreement. Victory Energy Operations, LLC, earned profits on the sale of Voyager boilers

after the License Agreement expired."

THE COURT: All right. Mr. Gisleson, recognizing that you would prefer more rather than less, but at least that much is accurate, is it not?

MR. GISLESON: That part is accurate, yes, your Honor.

THE COURT: All right, then that's your stipulation. And that removes the burden that you otherwise were carrying from trying to inject damages into this part of the case.

MR. GISLESON: Thank you for relieving me of that burden.

THE COURT: All right, we're going to take a short recess.

(Recess from 2:18 p.m.; until 2:30 p.m., with the Jury present.)

THE COURT: Go ahead.

MR. SHEEAN: Thank you, your Honor. Good afternoon, ladies and gentlemen. My name is Christopher Sheean, and with me today in the courtroom are my co-counsel, Mr. Brian Lewis and Mr. Matthew Garret. We represent the defendant in this case, Victory Energy Operations. With me in the courtroom today, also, is the president of Victory Energy Operations, Mr. John Viskup. And the general manager, Mr. Mark White. You will be hearing from them later.

Ladies and gentlemen, the facts of this case boil

down to one simple theme, competitive revenge. Indeck does not want to compete fairly with Victory Energy in the marketplace. And they've done everything they can to try and frustrate Victory's ability to compete in the marketplace.

The evidence will show that they're not entitled to the relief they're seeking. And at the end of this case, we're going to ask you to return a verdict in our favor.

But I want to address the specific theme here, and that is the statement that you don't take someone else's technology. That's what you heard a moment ago, you don't take someone else's technology. Well, I'm glad that's not really what happens in competition in the world. I'm glad. Because using your competitor's technology that's available for you and I to inspect in the marketplace, being able to do that is good for competition. And it encourages competition. We want companies that are able to take the information that's out there and available in the public domain and make a better mousetrap.

We've seen this time and time again with products that we buy. The first VCR that rolled out into the marketplace, cost $500 to $600. And within a few years the price of those came down, as competition increased and other companies learned how to make VCRs. The same thing happened with DVD players. And latest craze seems to be HDTV's, we see the price of those coming down. Because there is competition.

If a company doesn't have a patent on an innovation and a product, there is nothing that prevents its competitors from going into the marketplace, looking at that product and see if they can make it better and cheaper. That is good for competition, and that's good for our economy and that's good for consumers.

Now, you've heard some pretty serious accusations here, ladies and gentlemen. Victory Energy didn't steal anything. Because there wasn't any secret to steal. Every one of plaintiff's claims is based on information that is available to anyone out there. And if Victory, anyone else had access to it, it can't be a secret and it can't be a basis for a claim of theft or unfair competition.

The case can be divided into two parts. The License Agreement between the parties, and the claims involving Victory Energy's development of its new boiler, the Voyager boiler.

The License Agreement involved the sale of a line of boilers called the Keystone boiler. You've heard a little bit about the Keystone boilers a little bit already today. Keystone boilers came in to existence and around 1950, you will hear, by a company called Zurn Energy. Zurn Energy made these boilers until it sold this company to Aalborg Keystone. And there was a name change to Aalborg Industries. Then ultimately that company sold the Keystone line to Erie Power Technologies through that british company, DKME.

And you will hear in this case that when Erie Power went into bankruptcy, for about two weeks there was a company called CMI EPTI that owned the technology. Then it turned around and sold it to Indeck Keystone Energy. And this is the progression of companies that we need to keep in mind when you hear the evidence about what Aalborg Industries and Aalborg Keystone and Aalborg Industries, what they allowed their customers to have and what they allowed their customers to do. Because what happened back then is relevant as to what's out in the public domain today on the Keystone boiler.

Now, you will hear evidence that there have been nearly 3,000 Keystone boilers sold just up to 1996. That means there are over 3,000 Keystone boilers out there for anybody to go up to and inspect. Anybody can go out there and recondition one of these boilers, buy it used, take it apart, there's no prohibition on that. Thousands of people have seen these boilers.

Now, Erie Power realized in 2002 that it was not able to compete in the marketplace by selling its package boiler line. Erie Power had two problems. Number one, it closed its shops here in Erie back in the early '90s. And it was too expensive to ship smaller package boilers from the factory that it used in Korea.

So that, coupled with the fact that Erie Power had targeted a heavily engineered type of product, much more

technically advanced than the watertube boiler, so it had a lot of expensive engineers to pay. So as a result, Erie Power decided they needed to do something to develop a revenue stream with the Keystone boiler. The decision was made in late 2002 to enter into a License Agreement.

Erie Power was desperate for cash, it needed to find somebody who was licensed in this technology. Victory Energy was a willing participant. The president of Victory Energy, John Viskup, who I introduced a moment ago, was anxious to enter into the watertube package boiler market so that he would gain access to the know-how involving the overall boiler industry, so that he could develop a reputation for Victory Energy as a boiler manufacturer. And develop customer relationships in the industry so that it could sell boilers down the road. And the Keystone boiler offered a good opportunity.

Mr. Viskup was well aware of the Keystone boilers, he sold them for one of his former employers, he knew about the Keystone boiler. So he was more than willing to enter into this License Agreement.

Now, Victory Energy is a relatively young company, it started only eight years ago. It's based outside of Tulsa, Oklahoma. Eight years ago, Mr. Viskup and his partners started this company with only 14 employees, doing supervisory work, running boilers. Today Victory Energy employs over 300 people

in Oklahoma, selling boilers all over the world. Not just these Keystone watertube boilers, but other types of boilers. And they've developed an extensive distribution system and they've done it on the sweat and hard work of Mr. Viskup and his employees.

Victory Energy was anxious to enter into this License Agreement and the price was right. Erie Power only demanded $50,000, payable over two years, plus a four-percent royalty on all the boilers that were sold. With Erie Power desperate for cash, it was a good deal for Erie Power as well.

What the companies understood, ladies and gentlemen, was if they wanted to be successful in this relationship, they had to give Victory Energy a boiler that they could actually market and sell. They understood that Victory Energy would have to sell products that would be competitive in the marketplace, that would offer the same sort of features that its competitors offered and the features that its customers wanted and were required to have, in order to meet emissions guarantees on the boilers.

You'll hear testimony that in the 1990's the Clean Air Act and other emissions requirements were implemented that required people who run boilers to keep their emissions low, keep the air clean. In order to do that, certain features were implemented in the boilers.

Victory Energy and Erie Power understood that